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No. 90-99

In the Supreme Court of the United States

OCTOBER TERM, 1990

NELSON A. ITALIANO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals correctly held that an indictment alleging that petitioner had violated the mail fraud statute was substantially similar to a prior indictment that had been dismissed, so that the new indictment was timely under 18 U.S.C. 3288.

2. Whether a cable television franchise constitutes property within the meaning of the mail fraud statute, 18 U.S.C. 1341.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A16) is reported at 894 F.2d 1280. The opinion of the district court denying petitioner's pretrial motions (Pet. App. A17-A22) is reported at 701 F. Supp. 205. An opinion of the court of appeals reversing petitioner's conviction after his first trial (Pet. App. A23-A76) is reported at 837 F.2d 1480.

JURISDICTION

The judgment of the court of appeals was entered on February 20, 1990. A petition for rehearing was denied on April 18, 1990. Pet. App. A77-A78. The petition for a writ of certiorari was filed on July 13, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Middle District of Florida, petitioner was convicted on one count of mail fraud (18 U.S.C. 1341) and was sentenced to two years' imprisonment. Relying on *McNally* v. *United States*, 483 U.S. 350 (1987), the court of appeals reversed petitioner's conviction. Pet. App. A23-A76. A new indictment was returned, again charging petitioner with one count of mail fraud. Following a jury trial, petitioner was convicted again and was sentenced to four months' imprisonment, to be followed by three years' probation and 200 hours of community service. The court of appeals affirmed. Pet. App. A1-A16.

1. Petitioner worked for Coaxial Communications of the Suncoast, Inc., a corporation formed to obtain cable television franchises. The evidence at both trials showed that in 1980 petitioner bribed several county commissioners in Hillsborough County, Florida, in order to secure a cable television franchise in the county for Coaxial Communications. Pet. App. A2-A4.

The original indictment charged petitioner with mail fraud under an "intangible rights" theory. That is, the indictment alleged that petitioner had bribed the commissioners as part of a scheme to defraud the citizens of Hillsborough County of their right to honest government. Pet. App. A8. In light of this Court's decision in *McNally*, which was announced following petitioner's first trial and which "emasculated the vitality of the intangible rights doctrine" (*id.* at A29), the court of appeals reversed petitioner's conviction.

Less than six months later, another grand jury returned a new mail fraud indictment against peti-

tioner. This time the indictment alleged that petitioner had bribed the commissioners as part of a scheme to deprive the government of Hillsborough County of the cable television franchise. Pet. App. A9. Petitioner moved to dismiss the second indictment on two grounds. First, he claimed that the new indictment was barred by the five-year statute of limitations, 18 U.S.C. 3282, and was not saved under 18 U.S.C. 3288, which allows the filing of a new indictment within six months of the dismissal of a defective indictment. The basis for petitioner's timeliness challenge was the contention that the new indictment alleged facts beyond the scope of the original indictment. Second, petitioner argued that the new indictment failed to state an offense. The basis for that argument was the allegation that a cable television franchise is not "property" under *McNally*, and hence a scheme to obtain such a franchise is not proscribed by the mail fraud statute.

The district court rejected both claims. The court observed that "the basic factual allegations of the two indictments are the same: an alleged scheme to bribe members of the Board of the Hillsborough County Commissioners in order to obtain a cable television franchise agreement." Pet. App. A19. Accordingly, the court held that the indictment was not barred by the statute of limitations. The court also rejected petitioner's alternative argument, holding that the cable television franchise "clearly qualifies as 'property' whether characterized as tangible or intangible property." *Id.* at A21.

2. Following his conviction, petitioner renewed his statute of limitations claim on appeal, but he did not raise the argument that a cable television franchise is not property within the meaning of the mail fraud

statute.[1] The court of appeals rejected petitioner's argument that the indictment was untimely. The court pointed out that the central policy underlying statutes of limitations is notice to the defendant. If the charges in old and new indictments are substantially the same, the court held, a defendant has been given adequate notice of the charges against him and an indictment is timely under 18 U.S.C. 3288. Pet. App. A5-A7. Thus, the court held that an indictment is saved by Section 3288 if it "does not broaden or substantially amend the original charges 'tolled' by the previous indictment." Pet. App. A7.

The court then compared the charges in the second indictment and petitioner's original indictment. The court noted that the two indictments charged the same statutory violation, the same mailing in furtherance of the scheme, and the same underlying transaction as the purpose of the bribe. The only difference was in the indictment's characterization of the object of the scheme. Pet. App. A7-A11. The court found that difference to be immaterial. Since the factual allegations were the same in both indictments (*id.* at A12), the court concluded that any disparity between the two indictments did not "hinder[] [petitioner's] understanding of the conduct for

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[1] While petitioner's brief raised only the statute of limitations issue, petitioner sought to adopt any arguments raised in an amicus brief to be filed by Dennis McGillicuddy, Coaxial Communications' owner. See Def't C.A. Br. 18. However, the court of appeals denied McGillicuddy's motion for leave to file an amicus brief, and petitioner did not then raise the argument that the franchise is not property. The government did not brief the issue in the court of appeals, and the court merely noted that it is clear under Florida law that a cable television franchise is property. Pet. App. A11 n.6.

which he would be held accountable or his ability to prepare a defense for that conduct." *Id.* at A13.

ARGUMENT

1. Petitioner does not challenge the legal standard that the court of appeals applied. Rather, he makes the essentially factual argument (Pet. 14-19) that the court of appeals erred in concluding that the second indictment was substantially similar to the original indictment.

The return of a new indictment after a dismissal is governed by 18 U.S.C. 3288. In a case such as this one, a new indictment is saved only if the charges in the two indictments are substantially the same. The court of appeals determined that the change in the object of the mail fraud scheme in the two indictments was not sufficient to render the charges in the two indictments different. Petitioner disagrees with that conclusion, but the court of appeals' ruling is in accord with the approach used by all the other courts that have faced the issue. *E.g.*, *United States* v. *Gengo*, 808 F.2d 1, 3-4 (2d Cir. 1986); *United States* v. *Grady*, 544 F.2d 598, 602 (2d Cir. 1976); *United States* v. *Charnay*, 537 F.2d 341, 354 (9th Cir.), cert. denied, 429 U.S. 1000 (1976); *United States* v. *Davis*, 714 F. Supp. 853, 864 (S.D. Ohio 1988); *United States* v. *Lyle*, 677 F. Supp. 1370, 1376-77 (N.D. Ill. 1988).[2] As the

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[2] Petitioner contends (Pet. 18) that the decision below conflicts with a decision of a district court, *United States* v. *O'Neill*, 463 F. Supp. 1205 (E.D. Pa. 1979), which involved a prosecution for false statements under 18 U.S.C. 1014. A superseding indictment filed outside the limitations period was based on the same transaction, but it alleged a different false statement from those alleged in the first indictment,

court of appeals concluded, the original indictment gave petitioner more than adequate notice of the charges against him.

2. Petitioner also argues (Pet. 6-14) that a cable television franchise is not property within the meaning of Section 1341 and *McNally*. Petitioner failed to raise this argument in the court below, see note 1, *supra*, and he therefore may not raise it here. *Delta Air Lines, Inc.* v. *August*, 450 U.S. 346, 362 (1981); *United States* v. *Lovasco*, 431 U.S. 783, 788 n.7 (1977).

In any event, there is no merit to petitioner's claim. As the court of appeals observed (Pet. App. A11 n.6), franchises are considered to be property under Florida law. See 27 Fla. Jur. 2d, *Franchises From Government* § 2 (1981).[3] Moreover, review is not warranted on account of the disagreement among the courts of appeals as to whether, apart from principles of state law, franchises and licenses constitute property before they have been granted by the issuing body. See Pet. 8-11.[4] Congress recently amended

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and the district court dismissed the indictment. 463 F. Supp. at 1207-1208. As the court below recognized (Pet. App. A12-A13), *O'Neill* differs from this case because in this case only the object of the scheme changed, not the factual allegations regarding the underlying scheme.

[3] While petitioner disagrees with the court of appeals' interpretation of Florida law (Pet. 11), that issue obviously does not warrant this Court's review.

[4] Contrary to petitioner's suggestion (Pet. 9 & n.27), this Court has not resolved that issue in his favor. In *Community Communications Co.* v. *Boulder*, 455 U.S. 40, 48 (1982), where the Court reversed the court of appeals' holding that a city was immune from compliance with the antitrust laws with respect to the granting of a cable television franchise, the Court merely noted that the court of appeals

the federal fraud statutes to provide that "a 'scheme or artifice to defraud' includes a scheme or artifice to deprive another of the intangible right of honest services." Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7603, 102 Stat. 4508. The legislative history of the new provision explains that "[t]his section overturns the decision in *McNally v. United States* * * *. The intent is to reinstate all of the pre-*McNally* caselaw pertaining to the mail and wire fraud statutes without change." 134 Cong. Rec. S17,376 (daily ed. Nov. 10, 1988). Accordingly, whether a franchise is property under *McNally* is of no prospective importance. In any case arising in the future where a defendant bribes government officials in order to obtain a franchise or a license, it will be clear that the defendant engaged in a scheme proscribed by the mail fraud statute because bribery "deprives another of the intangible right to honest services."

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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had distinguished the case from another on the ground that the city had "no proprietary interest" in the franchise.

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